

# GAPS AND DISPARITIES IN WHISTLEBLOWER LAW

## OVERVIEW

Statutory whistleblower protections, where they exist, may differ significantly between laws. Disparities are often apparent, for example, in comparing the early federal whistleblower laws passed in the 1960s and 70s to more recent statutes, which generally offer more robust protections. This document explores common gaps and disparities in federal whistleblowing statutes.

## GAPS IN PROTECTIONS

Not all whistleblowers are covered under a whistleblowing law when they disclose wrongdoing in the public or private sectors. Even when individuals are covered under a law, there may be significant gaps in protections that leave them exposed to certain reprisal.

### PUBLIC SECTOR EMPLOYEES EXCLUDED FROM PROTECTIONS

Federal whistleblowing statutes generally frame protections in an employment context. That is, protecting employees from unlawful workplace retaliation when they speak out about their employer's misconduct. However, some workers are not covered.

#### PUBLIC SECTOR

Most career civil service employees in the executive branch are covered either under the [Whistleblower Protection Act](#) or under a standalone agency or sector-specific law.

However, some executive branch employees are [excluded from protections](#) including **political appointees** such as inspectors general. **Postal employees** are also excluded under the whistleblower protection act and rely on USPS policy for protections.

Also, employees of the **judicial and legislative branches** of the federal government are not covered under whistleblowing statutes that protect them for disclosing evidence of misconduct such as waste, fraud, or corruption. (See the [legislative branch whistleblowing](#) fact sheet for more information on that sector and unique protections under the Congressional Accountability Act).

#### A NOTE ON THE FIRST AMENDMENT

While public employees are empowered by the First Amendment to speak out on matters of public concern, in most instances they must do so in their **private capacity** to claim protections. In those circumstances, if those employees face retaliation, courts may not rule in the employee's favor unless the **public's interest** in learning about the alleged wrongdoing outweighs the government's interest to keep it restricted.

Note that under the Civil Service Reform Act a covered federal employee may have [additional inroads](#) for asserting their first amendment rights as a defense against retaliation.

### PRIVATE SECTOR EMPLOYEES EXCLUDED FROM PROTECTIONS

Many private sector workers fall under the umbrella of one or more industry or sector-specific whistleblower laws. However, **not all sectors benefit from unique protections**. Employees in the agriculture and meat packing industries, for example, do not have a dedicated whistleblowing statute.

NOTE: These employees may be able to blow the whistle under separate private sector laws such as the **Occupational Safety and Health Act** and the **Sarbanes-Oxley Act** where appropriate.

## ORGANIZATIONS AND WHISTLEBLOWING-ADJACENT INDIVIDUALS

Most federal laws do not extend rights beyond the employment context of current employees, former employees, and applicants, yet some individuals are vulnerable to retaliation due to their relationships with a whistleblower or unique vantage point. For example, **family members of whistleblowers** may also face blacklisting in their career field due to their spouse or parent's whistleblowing.

Further, **organizations** may be poised to expose the illegal acts of another organization but may fear reprisal from industry leaders, the government, or other actors that could affect the organization's own future and the wellbeing of its employees.

## EVOLVING RETALIATION TACTICS EXPOSE GAPS

While modern whistleblower protection laws cover a wide range of prohibited retaliatory actions, laws may not account for the broad spectrum of whistleblower retaliation tactics -- particularly as new tactics emerge.

- **Retaliatory Investigations:** Apart from the [Military Whistleblower Protection Act](#), statutes protecting federal employees do not allow whistleblowers to challenge retaliatory investigations. Under the Whistleblower Protection Act, employees may challenge these investigations *if* they result in a prohibited retaliatory action such as termination. As a result, retaliatory investigations may persist for years as an attempt to discredit the messenger and distract from the message.
- **Security Clearance Retaliation:** Security clearances and the eligibility to access classified information are generally a requirement of working in the intelligence community. As such, retaliating against a whistleblower by limiting or removing their access can prohibit that individual from working in their career field moving forward. Under [50 USC § 3341](#) and [Presidential Policy Directive-19](#), retaliatory clearance suspensions are prohibited. However, a whistleblower can only challenge a suspension if it lasts for at least one year. This leaves whistleblowers in limbo, unable to challenge shorter suspensions as retaliatory.
- **Doxing:** Doxing occurs when someone intentionally and publicly exposes another's personal information, commonly through the internet. This kind of exposure may threaten a whistleblower's emotional, physical, and financial wellbeing. Even just the threat of this retaliation tactic could discourage potential whistleblowers from speaking out.

## CIVIL AND CRIMINAL LIABILITY

Federal laws typically limit protections against retaliation to actions taken in the employment context -- such as being demoted or terminated. However, employers may engage in forms of **civil or criminal retaliation** -- such as charging the whistleblower with a defamation lawsuit or making them the target of a criminal investigation under false pretexts. Even when the whistleblowing was lawful, retaliatory lawsuits -- or the mere threat of them -- can effectively silence whistleblowers or distract from the wrongdoing they brought to light. These tactics may undermine their credibility or ability to defend themselves due to costly legal battles.

## DISPARITIES BETWEEN WHISTLEBLOWER LAWS

Where protections exist, there are significant disparities between laws in terms of scope and enforcement. Below are several criteria that may differ widely between statutes.

### SCOPE (WHO AND WHAT ARE PROTECTED AND PROHIBITED UNDER THE LAW)

#### Who is protected?

While laws typically protect whistleblowers in an employment context, including current and former employees, some laws also protect applicants for employment, interns, and volunteers. Others limit protections when employees are in a probationary phase.

#### What is protected?

Most modern whistleblower statutes require that the whistleblower made their disclosure with a reasonable belief that they were disclosing evidence of an identified category of misconduct. For example, evidence of illegality or gross waste. However, laws may

categorize relevant misconduct differently. [Federal contractor protections](#), for example, explicitly protect disclosures related to federal contract fraud.

Further, some laws limit protected audiences, such as to Congress or an inspector general, while others protect public disclosures. For some laws, like the Whistleblower Protection Act, it depends on the nature of the information being disclosed.

Finally, in addition to disclosures, certain laws also protect conduct such as congressional testimony, cooperation with an investigation, and exercising an individual's rights. However, laws vary in exactly what conduct they protect, if any.

### **What is prohibited?**

As an overarching principle of whistleblower laws, employers are prohibited from retaliating against their employees for protected disclosures or conduct. However, laws differ in how they define a prohibited action for the purposes of establishing retaliation. Laws will typically prohibit retaliatory termination, for example, but may only cover suspensions that last a certain amount of time.

## **ENFORCEMENT (WHEN AND HOW CAN WHISTLEBLOWERS ASSERT THEIR RIGHTS AND OBTAIN RELIEF)**

Obtaining relief from unlawful retaliation can take years, and the enforcement rights and processes vary significantly between laws.

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### **PROCESSES FOR ENFORCEMENT**

While many statutes spell out exacting processes for how whistleblowers may enforce their rights in the face of retaliation, not all laws do. For example, the Intelligence Community Whistleblower Protection Act prohibits retaliation, but it does not provide whistleblowers with a means to seek relief. Other laws leave it to the executive branch to establish enforcement protocols, often requiring an agency head to create them.

Finally, some laws provide a host of administrative remedies and allow whistleblowers to appeal to federal court where necessary. Some provide for jury trial access. Other laws offer administrative relief only.

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### **BURDEN OF PROOF**

Whistleblowers must be able to prove certain elements of their retaliation claim to qualify for relief. For example, under the Whistleblower Protection Act, whistleblowers must demonstrate by a preponderance of the evidence that their whistleblowing was a contributing factor in the prohibited personnel action that they faced. However, not all laws apply this same standard and may place a heavier burden on the whistleblower to prove their case.

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### **STATUTES OF LIMITATIONS**

A statute of limitations is the window of time when someone may file a complaint of unlawful retaliation for the purpose of enforcing their rights. In whistleblowing laws, these time periods vary widely. The whistleblower provisions of the Occupational Safety and Health Act, for example, provide a [30-day statute of limitations](#). By contrast, the Whistleblower Protection Act allows three-years. The clock generally starts whenever the retaliatory action takes place, or when the whistleblower becomes aware of it.

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### **REMEDIES**

If a whistleblower is successful in proving their claim of unlawful retaliation, they may be eligible for different legal remedies including relief such as reinstatement to their position if terminated or suspended, legal and other fees, and back pay. However, not all whistleblower laws provide the same relief.

## **ADDITIONAL RESOURCES**

- ❖ [CRS: Survey of Federal Whistleblower and Employee Protection Statutes](#)
- ❖ [CRS report on intelligence community whistleblower protections](#)
- ❖ [OSHA Whistleblower Statutes Summary Chart](#)